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AUG 25 1959
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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion, findings, and conclusions of the district court (R. 28–41) are reported at 164 F. Supp. 827.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 4. The judgment of the district court (R. 27–28) was entered on July 16, 1958, and the notice of appeal was filed on September 11, 1958 (R. 41-42). This Court noted probable jurisdiction of the appeal on February 24, 1959 (R. 43). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as

amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U.S.C. 1, 3, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * the District of Columbia, or in restraint of trade or commerce * * * between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

The Government's evidence in a Sherman Act civil suit charging a drug manufacturer with illegal price maintenance showed that, in areas which had no "fair trade" laws, the manufacturer had (1) refused to sell directly to retailers who failed to observe its minimum resale prices and/or advertised discount prices on such products, (2) induced and compelled, and obtained agreement from, its wholesale distributors to stop selling to such price-cutting and discount-advertising retailers, and (3) resumed selling to the retailers after they had ceased price cutting or discount advertising and, in some instances, had agreed with the manufacturer to stop advertising discount prices. The evidence further showed that the manufacturer competes with the wholesalers in selling directly to the retailers and that, on pain of their being cut off on its products, it requires the wholesalers to observe its minimum resale prices and prohibits them from giving the quantity discounts which it offers. The evidence also shows that, after the Government had instituted its Sherman Act investigation and partly as a result thereof, the manufacturer had terminated its retail, but not its wholesale, price maintenance practices. The following questions are presented:

1. Whether the district court erred in holding that these practices constituted merely unilateral action by the manufacturer in selecting its customers, which is permissible under *United States* v. *Colgate & Company*, 250 U.S. 300, and not a price-fixing conspiracy between

the manufacturer and the retailers and wholesalers.

2. Whether the district court further erred in holding, as an alternative ground for dismissing the complaint, that no relief was necessary because there was "no reasonable probability" that the defendant would resume its attempts to maintain resale prices.

STATEMENT

On May 2, 1957, the United States filed a civil suit under Section 4 of the Sherman Act charging that Parke, Davis & Co. (Parke Davis) had violated Sections 1 and 3 of that Act by conspiring to fix wholesale and retail prices of pharmaceutical products which it manufactures. The principal terms of the alleged conspiracy were (1) that certain retail drug stores in Washington, D.C., agreed with Parke Davis (a) not to sell its products at less than the resale prices which it fixed and (b) not to advertise such products at discount prices; and (2) that five wholesale druggists (three in Washington and two in Virginia) agreed with Parke Davis (a) not to sell its products at less than the resale prices it fixed and (b) not to sell such products to retail druggists who sold or advertised such products at discount prices (Pars. 13–15, R. 4–5). A number of retailers and the wholesalers were named as co-conspirators, but not defendants (R. 2).[1]

[1] Prior to the filing of the suit, Parke Davis and two of its officials had been indicted for the same violations of the Sherman Act. At the close of the Government's case, the court directed a verdict of acquittal. *United States* v. *Parke, Davis & Company*, D.D.C., Cr. 111-57.

At the conclusion of the Government's evidence, the district court granted the defendant's motion to dismiss and entered judgment of dismissal (R. 27–28). The court held (R. 300) that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint." It ruled that there were no agreements between Parke Davis and its retailers and wholesalers, and that appellee's actions "were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States* v. *Colgate & Company,* 250 U.S. 300" (R. 30). The court further held, as an alternative ground for dismissal, that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed," and that there was "no reasonable probability or danger" that the practices would be resumed (R. 30).

1. THE FACTS [2]

Parke Davis manufactures and sells approximately 600 different pharmaceutical products (Fdgs. 1, 2, R. 31). It distributes these products to drug wholesalers and retailers in the District of Columbia and Virginia through its Baltimore, Maryland, branch office (Fdg. 1, R. 31). Retailers may buy Parke Davis products either directly from it or through wholesalers; on many items, its own prices are "substantially" lower than the wholesalers' (R. 59, 95–96, 132; Fdg. 5, R. 31–32).

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[2] The statement of the facts is based upon the testimony and documentary evidence introduced by the Government, and certain unchallenged findings of the district court. Except where

Parke Davis has unilaterally established minimum wholesale and retail resale prices (Fdg. 7, R. 32). Its retail catalogue stated that the "Minimum Retail Prices" therein set forth as "applying" in states having "fair trade" laws were also "suggested" for use in states which had not enacted "fair trade" laws (Fdg. 8, R. 32). During the period covered by the complaint, there was no "fair trade" law in effect in the District of Columbia or Virginia (Fdg. 6, R. 32). Parke Davis' wholesale catalogue stated that it was the company's "policy" to sell to wholesalers who observed the "Net Price Selling Schedule" therein set forth (Fdg. 9, R. 32).[3] It was also the company's "accepted custom" that the wholesalers will not sell to retailers who cut prices (R. 250); the wholesalers, however, had never been aware of such "custom" (R. 162, 204–205, 252).

A. PARKE DAVIS' INITIAL EFFORT TO STOP THE SELLING AND ADVERTISING OF ITS PRODUCTS AT CUT-RATE PRICES

In the Spring of 1956, the manager of Parke Davis' Baltimore branch office was aware that certain retailers in the District of Columbia and Virginia were advertising and selling Parke Davis products below the "suggested" resale prices (R. 251–252, 311). However, at that time he did not know of any company policy not to sell to price-cutting retailers in non-"fair trade" areas (R. 250–251, 277–278). He first learned of such policy from the president of

otherwise indicated, we believe that this evidence is substantially uncontradicted.

[3] The facts with respect to Parke Davis' wholesale price maintenance are set forth in the Argument, *infra*, pp. 36–40.

Parke Davis at a branch managers' meeting in June, 1956, at the company's main office in Detroit (R. 251–252). After that meeting, he instructed his field manager for Washington and Virginia "to contact these price-cutting retailers and tell them if they did not observe your [Parke Davis'] prices they would be cut off," and also "[i]nstructed him to go to the wholesalers and say 'We don't want you to sell to these price-cutting retailers' " (R. 253, 274–275).

The field manager carried out his instructions. Early in July 1956, he (and or other Parke Davis representatives) visited the retailers which had been advertising and selling Parke Davis products at cut-rate prices,[4] and told them that, unless they ceased doing so, they would be cut off, both on direct purchases from Parke Davis and on purchases through wholesalers (R. 60, 100–102, 117–118, 147, 151–152, 221, 226, 241). Thus, McReynolds Pharmacy was informed by the Parke Davis representative "that it was the policy of the main bosses that there will be no price-cutting on Parke, Davis merchandise, and if we continue to cut prices, they will no longer sell us * * * [and will] see that [we] do not get the merchandise" (R. 101). The Parke Davis representative also stated to Haft, the operator of Dart Drug, "that he had already that day contacted Drug Mart Stores" and "had told them the same thing; they would be cut

[4] These retailers were Dart Drug, Standard Drug, State Drugs, Babbitt's, McReynolds Pharmacy, Peoples, and Drug Mart (R. 147, 226, 254). The latter is a group of 30 independent drug stores "who got together to advertise and buy cooperatively" (R. 146; 104–105).

off from their source of supply if they didn't bring their prices up—and they had indicated that they would raise their prices" (R. 60); and that "they would go to Peoples Drugstores, to Tate's Drugstores, to Standard Drugstores, to Babbitt's stores, and anyone else that was applicable in this area" (R. 61).

Despite these threats, the retailers, with two exceptions (see *infra*, p. 9), refused to go along with Parke Davis (Fdg. 13, R. 34). The operator of McReynolds stated that, until he had "equaled" the advertising of the others, he would not be "interested in going along" (R. 102). The president of State Drugs, upon being informed by the Parke Davis representative that the others had ceased their cut-rate practices, stated that "if what you say is true, then I will cease, also" (R. 117–118); however, when he learned through a phone call to Dart Drug that the statement was not true, he informed the Parke Davis representative that he would have "to leave my sign on the window" advertising Parke Davis products at discount prices (R. 118). Haft of Dart Drug similarly refused (R. 61); and he complained that a number of Peoples Drug stores, including one directly across from his store, were cutting prices on Parke Davis products (R. 63, 225).

The Parke Davis representative informed Haft that he "would see Peoples and try to get them in line" (R. 225). He then advised a vice-president of Peoples that it would be cut off if it continued to cut prices (R. 226, 241). Because of this threat,

Peoples agreed that it would "go along with" Parke Davis' "plan" (R. 241).[5]

Also, in the summer of 1956, a Parke Davis representative told the coordinator of the Drug Mart (see note 4, *supra*) that "Peoples was going to stop cutting prices, or had stopped cutting prices * * * and asked me whether we would go along. He also said at the time that, if we did not stop cutting the price, that P-D would find a way to cut our stores off from direct buying, or from buying the P-D products. I told him at the time that I would go along with him; that, as long as Peoples went along, I would go along" (R. 147; see, also, R. 106). Drug Mart discontinued its cut-rate advertising (R. 147–148, 150, 106–107; GX 7 (not printed)).[6]

B. THE CUTTING-OFF OF THE OFFENDING RETAILERS BY PARKE DAVIS AND ITS WHOLESALERS IN ACCORDANCE WITH ITS THREATS

In accordance with its threats, Parke Davis stopped selling directly to the retailers who continued to advertise and sell Parke Davis products at discount

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[5] The conversation, as described by the Parke Davis official, was as follows (R. 241):

Q. Now, what did Mr. Downey [the Peoples vice-president] say to you?

A. He said, "Do you mean that you would cut us off?"

I said, "Well, according to our policy, that is the only thing we could do, Mr. Downey."

Q. What did he say?

A. He said, "Well, I see no reason why we can't go along with it."

But, he says, "We can't sit here forever and let this man [Haft of Dart Drugs] demoralize everything."

But, he said, "We will go along with your plan."

[6] The 30 stores in the Drug Mart group advertised in the newspapers only as a group and not individually (R. 113, 149).

prices (R. 62–63, 102, 218–219, 228–229, 254). Parke Davis also instructed or requested its wholesalers in Washington and Richmond not to sell Parke Davis products to them (R. 70–71, 96, 103, 115, 124–125, 137–138, 153–154, 157–158, 164, 197–198, 205–208, 219, 228), and informed the wholesalers "that they were visiting all wholesalers in this area on the same problem" (R. 126; 138, 197–198). Thus, the Parke Davis representatives had the following conversation with the vice-president of District Wholesale Drug (R. 197–198):

> Q. Can you tell us what was said during this conversation with these representatives?
>
> A. They asked me not to sell a group of retailers until a price situation was straightened out.
>
> Q. Did they name these retailers to you, sir?
>
> A. Yes, they did.
>
> * * * * *
>
> Q. What did you tell them, sir?
>
> A. I asked them if they were requesting it of me alone, or would they go to other wholesalers. And they said they would visit the local wholesalers. And then I agreed to abide by it.
>
> Q. You agreed to abide by their request?
>
> A. That is correct.[7]

[7] Again, at R. 202, this witness testified on cross-examination:

A. The one thing that did concern me, I specifically asked them if we were the only wholesaler who would have that request made. And they said no, they were visiting all three local wholesalers. And I said, "Well if that is the case, I will go along with whatever you suggest."

The president of District Wholesale Drug similarly asked the Parke Davis representatives "the same question, whether other wholesalers are to be informed in the same manner" (R. 206–7).

The wholesalers were aware that, if they continued selling to the price-cutting retailers, they would, in turn, be cut off by Parke Davis (R. 130, 210, 271). They, therefore, "cooperated" or "agreed" with Parke Davis (R. 198, 219, 254), and refused to fill the retailers' orders for Parke Davis products (R. 68, 71, 103–104, 113–114, 118–119, 165–166),[8] marking the orders as "Out" even though they were in stock (R. 72, 103, 114, 144–145, 201, 215).[9] As a result, with one brief exception,[10] the five retailers were cut off on

[8] Two of the wholesalers testified that, had it not been for Parke Davis' actions, they would not have cut off the retailers (R. 142, 168, 219). After one of the wholesalers instructed his personnel to "cut" (*i.e.*, fill only part of) Dart's orders for Parke Davis merchandise, he was again visited by Parke Davis representatives who stated that "they had seen an invoice of ours in a store" indicating "that we had shipped some Parke Davis merchandise" and that "they wanted us to discontinue it" (R. 126–127). As a result, this wholesaler "[c]ut Dart off completely" (R. 127).

[9] Although the wholesalers instructed their personnel not to fill Parke Davis orders for the retailers (R. 126–127, 144–145, 164, 198, 208, 214–215), a few orders might have "slipped through" (R. 199, 212, 257) or have been filled by "mistake" (R. 130; see also R. 93–94, 115). In addition, one of the wholesalers in Richmond, Virginia, apparently did fill orders for one of the retailers (R. 158).

[10] A couple of weeks after Dart Drug had been cut off on July 3, 1956 (R. 72), Parke Davis' Baltimore office told Haft of Dart that if he "would stop advertising" cut-rate prices, Parke Davis would resume selling to him, and that if he stopped, "everyone else would" (R. 224–225, 232, 64). Haft "agreed to stop the advertising" (R. 64). From July 19 to July 27, 1956, Dart Drugs again received some shipments from Parke Davis (R. 72, 64–65, 225). However, it was again cut off a couple of weeks later when, following a complaint by Haft that other stores were again advertising discounts, Dart Drug also resumed such advertising (R. 65–66, 225).

Parke Davis products for approximately seven weeks in July and August, 1956 (R. 72, 114–115, 119, 230, 256–257).

C. PARKE DAVIS' SECOND EFFORT TO ELIMINATE PRICE-CUTTING ADVERTISING

On August 28, 1956, the manager of Parke Davis' Baltimore office visited three of the retailers in Washington who had been cut off—Dart, State, and McReynolds (R. 230, 232–233, 256–257, 260–261). They asked Haft of Dart "if I had had enough, if I was willing to agree to their terms * * * they said if I would discontinue advertising, as per the former agreement, take the signs out of the window * * * that they would resume shipment * * * (R. 73)."[11] Haft "discontinued advertising, took the signs off the window, and took the cards out of the window * * *" (R. 74), and he was then "able to again obtain Parke Davis products direct from the company" and also from the wholesalers (R. 74–75).[12] The Parke Davis officials also stated to Haft "that they had gotton Standard Drug, Babbitt, Tates [*sic*], Peoples and all the rest of the retailers back in line * * * in reference to advertising and window displays on Parke Davis items"

[11] The Parke Davis officials testified that the suggestion to discontinue advertising was not made by them, but by Haft (R. 232–233, 258).

[12] On December 12, 1957, after Haft had testified in the criminal case which resulted in acquittal (see *supra*, note 1), Parke Davis advised him by letter (R. 307) that it would no longer sell directly to him (R. 81–82). Since that date, Haft has been obtaining Parke Davis products only from wholesalers—but at "substantially higher" prices than on direct purchases from Parke Davis (R. 95–96).

(R. 74), and that "everyone else would stop advertising" (R. 85). Haft gave the Parke Davis officials "his word on the 28th of August that he would not advertise cut prices" (R. 260, 74; 314).[13]

The Parke Davis officials asked the operator of State "if I would be willing to take my prices down and of course sell it on the inside [at cut prices] if the other so-called discount stores ceased advertising in the paper, and I informed him that I would be very happy to; I would agree to that" (R. 119).[14] Approximately a week later, the Parke Davis officials returned and indicated "that everything was O.K. and that I accepted, and of course I assumed that meant that I could take my signs down and sell the vitamins at reduced prices on the inside, which I proceeded to do" (R. 120). Similarly, the Parke Davis officials told a McReynolds partner that "If you fellows would be willing to go along to the extent, since you do not advertise in the newspaper, if you

[13] The reason that Parke-Davis was so anxious to stop the cut-rate advertising is explained in the testimony of Powers, the assistant manager of the Baltimore branch office. He stated that Parke Davis "never had any problem" with price cutting in the area until the "widespread newspaper advertising" began (R. 221-222); that if they could control the advertising "it would take the bang out of it, or the so-called impetus that advertising was causing" (R. 221), and would give Parke Davis "some measure of control over the price situation" (R. 223); and that the advertising was "demoralizing" (R. 222-223). See *infra*, p. 24, n. 17.

[14] This witness further stated that "everything was verbal, and as far as any commitment goes, that was the way I understood the conversation, that if the other stores would cease advertising in the paper, I would proceed to take my signs down, and that is the way it was left" (R. 120).

would just take your signs down, we could again do buying and business together" (R. 109–110). After McReynolds "agreed temporarily that we might take these signs down" (R. 110) and "stop[ped] all of our signs which was the only extent of our advertising", it was "then able to buy direct from Parke Davis again" (*ibid.*).[15]

On August 28, 1956, or shortly thereafter, the Baltimore manager advised all the wholesalers that "they could again sell to these retailers" (R. 260–261; see R. 74–75, 130, 138, 167, 209–210, 235). Except for one advertisement, for several weeks thereafter there was no cut-rate advertising in the Washington newspapers by the retail drug stores which previously had been cut off (R. 262), or by Peoples (R. 107–109) or Drug Mart (R. 147–148, 229–230) (see pp. 8–9, *supra*). Such advertising was not resumed in the District of Columbia until November, 1956, when Standard Drug ran "a cutrate advertisement on Parke Davis items" (R. 75, 262). A Parke Davis representative requested Dart not to follow suit "and [to] give him a chance to straighten the situation out", but this request was refused (R. 75–76). The retailers

[15] One of the Parke Davis officials testified that, after telling the State operator that Haft of Dart had suggested stopping advertising, he asked him "would they want to go along on such a policy as that or such a plan," and the State man indicated that "it was acceptable" to him (R. 233). Similarly, he testified that the McReynolds representative stated that "if Dart would not advertise, we are interested in doing business with you and we will take our signs out of the windows" (R. 233–234). See also R. 260–264, for further testimony that the Parke Davis officials told State and McReynolds that Dart had agreed to stop advertising.

"again started advertising" and "[blew] up the minimum retail price situation in Washington" (R. 263). Parke Davis made no further effort to stop the advertising (R. 76, 110–111, 122).

2. THE DECISION OF THE DISTRICT COURT

In holding that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint" (R. 300), the district court stated (R. 29) that Parke Davis had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell"; that Parke Davis' representatives "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy"; that the representatives "likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant"; that "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others"; and that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy." The court concluded (R. 30) that "there was no coercion by defendant and no agreement with co-conspirators," and that Parke Davis' "actions * * * were properly unilateral and sanctioned by law under

the doctrine laid down in the case of *U.S.* v. *Colgate & Company*, 250 U.S. 300." [16]

The court further ruled that in the fall of 1956 Parke Davis "abandoned in good faith its efforts to maintain minimum resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products" in the District of Columbia or in Virginia. The court stated (R. 30) that, although Parke Davis' assistant general attorney had testified that its abandonment of attempts to enforce "fair trade" prices in the District was "in some measure" the result of Parke Davis' having learned of the Department of Justice investigation of the matter, it was "evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field." The court found (Fdg. 27, R. 38) that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia. The court concluded (R. 30–31) that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from

[16] In its findings, the court found (Fdgs. 21–23) that Parke Davis did not solicit any agreement with Drug Mart, Standard Drug, or Dart Drug with respect to prices or advertising, and that neither Drug Mart nor Standard entered into any such agreement with Parke Davis.

doing as alleged where there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture."

SUMMARY OF ARGUMENT

I

A. Parke Davis' activities to maintain retail resale prices in the District of Columbia went far beyond any rights it might have under *United States* v. *Colgate & Co.*, 250 U.S. 300. While *Colgate* sanctions "a simple refusal to sell to customers who will not resell at prices fixed by the seller," it does not permit "express or implied" "arrangements as to prices" (*United States* v. *Bausch & Lomb*, 321 U.S. 707, 721, 722, 729). Parke Davis did not merely inform the retailers of its price-maintenance policy, and then stop selling to those who refused to observe that policy. It (1) threatened to cut off the offending retailers if they persisted in cutting prices; (2) cut them off on direct purchases, and organized a boycott of the retailers by the wholesalers designed to dry up all sources of supply of Parke Davis products; and (3) did not resume selling Parke Davis products to the retailers, or permit the wholesalers to do so, until the retailers had undertaken to stop cut-rate advertising, and thereby to minimize the effectiveness of their price competition. In repeated visits to the offending retailers, Parke Davis made it clear that its actions were part of an organized campaign directed against all price-cutting retailers in the area, and that it was similarly approaching, and getting assurance of "co-

operation" from, all of them. Similarly, in inducing its wholesalers to boycott the price-cutting retailers, Parke Davis made it clear that such "cooperation" was being sought and obtained from all its wholesalers.

These facts, resting on undisputed testimony, much of it provided or corroborated by the Parke Davis officials, clearly establish an illegal price-cutting conspiracy. It is not negated by the testimony of some (but not all) of the witnesses that they had not entered into any formal "agreement" with Parke Davis to do what they in fact did.

The fact that Parke Davis not only itself refused to sell to the offending retailers, but also organized a boycott of them by the wholesalers in the District of Columbia, is further proof that Parke Davis' conduct went far beyond any permissible selection of customers. It was, instead, coercion of its customers, intended to compel them to observe its "suggested" resale prices in a non-"fair trade" area. Participation by the wholesalers in Parke Davis' campaign, while obviously unnecessary if Parke Davis was merely exercising its right to sell to whom it chose, was essential for Parke Davis to achieve its aim of stopping price cutting in the District. The retailers could be brought to terms only by closing off all their sources of supply. Such a combination of manufacturers and wholesalers to boycott retailers refusing to maintain "suggested" resale prices has uniformly been held to constitute a *per se* violation of the Sherman Act.

B. Parke Davis' continuing actions to maintain its "suggested" wholesale resale prices in the District of Columbia amount to far more than a seller's unilateral selection of its customers, permissible under *Colgate*. Parke Davis and its wholesalers sell directly to many of the same retailers and are in direct competition for their business. Parke Davis requires its wholesale customers, upon pain of being cut off, to adhere to the resale prices which it prescribes, and does not permit them to make available to their retail customers the substantial quantity discounts which Parke Davis offers retailers dealing directly with it. Parke Davis' restriction is thus designed to insure that the wholesalers, whom it concedes can render better service than it can, will not compete with it pricewise. And, as the record makes clear, the wholesalers followed Parke Davis' "suggested" resale prices, not because they adopted such prices in the exercise of their own business judgment, but because Parke Davis requires them to do so.

Where, as here, a manufacturer who is in direct competition with its wholesalers in selling to retailers compels the wholesalers to follow its "suggested" resale prices, it engages in illegal price fixing. Since the District of Columbia is not a "fair trade" area, Parke Davis could not have entered into express agreements requiring its wholesalers to observe its resale prices. The decision below, by treating these price-maintenance understandings and implied agreements as involving merely the unilateral selection of customers, thus permits Parke Davis to do indirectly what it could not do directly.

II

The district court held, as an alternative ground for dismissing the complaint, that the Government was not entitled to injunctive relief because there was "no reasonable probability" (R. 30) that Parke Davis would resume its attempts to fix resale prices. It stated that Parke Davis had abandoned its resale price-maintenance efforts in 1956 because of "business and economic conditions in its field", and that, "under the long-continuing competitive conditions", the company could not resume its price-fixing endeavors except at a "heavy financial loss".

But the only evidence in the record showing the reasons for abandonment of Parke Davis' attempts to enforce retail "fair trade" prices in the area is the testimony of a Parke Davis official that one of the reasons therefor was the Government's antitrust investigation. There was no evidence establishing the "economic conditions" conjectured by the court or the "long-continuing competitive conditions" purporting to make resumption impracticable. Further, there is nothing in the record which indicates that Parke Davis has ever abandoned its conspiracy with the wholesalers under which the latter adhered to resale prices fixed by it; the district court, therefore, plainly erred in holding that there was no need for relief with respect to this specific allegation of the Government's complaint.

The price-fixing schemes here involve subtle and implied agreements and understandings of a type necessarily difficult to uncover. In this situation, we

submit that the Government establishes a prima facie case for relief upon showing that the defendant has committed the violations charged, and the defendant then has the burden of coming forward to show that special circumstances exist which make relief unnecessary in the particular case. The existence of such circumstances necessarily lies peculiarly within the knowledge of the defendant. Since it was Parke Davis which raised the issue that there was no need for relief, it was incumbent upon it to show that there was no reasonable expectation that the wrong would be repeated. Instead, Parke Davis did not even disclaim any intention to resume its price-fixing attempts, much less to show that, because of economic or other conditions, relief is unnecessary.

ARGUMENT

I

PARKE DAVIS HAS ENGAGED IN ILLEGAL PRICE-FIXING ACTIVITIES WITH RESPECT TO RESALE OF ITS PRODUCTS AT BOTH THE RETAIL AND WHOLESALE LEVELS

As the undisputed facts of record make clear, Parke Davis, with the forced cooperation of the co-conspirator wholesalers, undertook in 1956 to fix the resale prices charged for its products by retail drugstores in the District of Columbia and Virginia (which were not then "fair trade" areas) and, when these efforts proved only partly successful, undertook similar efforts to eliminate advertising of retail price cutting. It also required the wholesale drug dealers in the area, with whom it directly competes in sales to retail druggists, to maintain fixed prices and pricing practices

as a condition of their carrying Parke Davis products. While these efforts admittedly would be illegal if the result of "agreement" or "conspiracy", the court below concluded that Parke Davis' activities in both areas were limited solely to unilateral action permissible under *United States* v. *Colgate & Company*, 250 U.S. 300.

In the *Colgate* case, this Court stated (250 U.S. at 307) that, absent "any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." However, less than a year later, the Court explained that *Colgate* involved an "interpretation of an indictment" as "fail[ing] to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same' ". *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99. The Court pointed out (*ibid.*) that there was an "obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers

throughout the different States which undertake to bind them to observe fixed resale prices."

Since that time this Court has carefully distinguished "between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices * * *." *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 729. While *Colgate* indicates that "a simple refusal to sell to customers who will not resell at prices fixed by the seller" is permissible under the Sherman Act" (*id.*, at 721; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454), the seller "may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade" (*Beech-Nut* case, *supra*, p. 453; *Bausch & Lomb* case, *supra*, p. 722). Furthermore, it is settled that "the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances" (*Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210; *Schrader* case, *supra*, p. 99).

As we shall show, Parke Davis' activities in attempting to maintain resale prices in the District of Columbia plainly went far beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb*, *supra*, p. 721); "[a]s in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers [and retailers] in [Parke Davis'] * * * published resale price list" (*id.*, p. 723).

A. THE RETAIL PRICE MAINTENANCE SCHEME

Parke Davis did not merely inform the retailers of its price-maintenance policy, and then stop selling to those who refused to observe that policy. On the contrary, it embarked upon a definite campaign to end "the price-cutting situation that existed in Washington" (R. 252, 232, 217) and the accompanying "demoralizing" price-cutting advertising (R. 315–316). To do this, it (1) threatened to cut off the offending retailers if they persisted in cutting prices; (2) cut them off on direct purchases, and organized a boycott of the retailers by the wholesalers designed to dry up all sources of supply of Parke Davis products; and (3) did not resume selling Parke Davis products to the retailers, or permit the wholesalers to do so, unless the retailers had undertaken to stop cut-rate advertising, and thereby to minimize the effectiveness of their price competition.[17] The entire campaign was carried on through repeated visits by Parke Davis officials to the offending retailers, who were urged to "go along and play the game regularly * * * according to the rules" (R. 225), and who were advised that Parke Davis similarly was

[17] Parke Davis officials testified that elimination of the advertising was an important step toward "control over the price situation" (R. 223) which would "take the bang out of" the price-cutting (R. 221; see, also, R. 222, 237, 246). The Parke Davis area manager stated that he "didn't differentiate between the two [price cutting and cut-rate advertising]" (R. 254; see, also, R. 262). As this Court has recognized, "Modern competition for business finds advertising one of the most usual and useful of weapons." *Franklin National Bank* v. *New York*, 347 U.S. 373, 377.

approaching their competitors. See the Statement, *supra*, pp. 6–14.

The record thus shows that Parke Davis was the moving party in a price-fixing scheme of the type which has been repeatedly and consistently condemned as illegal under Section 1 of the Sherman Act. *Bausch & Lomb, Beech-Nut* and *Schrader* cases, *supra; Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; cf, *Connecticut Importing Company* v. *Continental Distilling Corp.*, 129 F. 2d 651 (C.A. 2); *Shakespeare Co.* v. *Federal Trade Commission*, 50 F. 2d 758 (C.A. 6); *Moir* v. *Federal Trade Commission*, 12 F. 2d 22 (C.A. 1); *Q.R.S. Music Co.* v. *Federal Trade Commission*, 12 F. 2d 730 (C.A. 7); *Toledo Pipe-Threading Machine Co.* v. *Federal Trade Commission*, 11 F. 2d 337 (C.A. 6).

1. Parke Davis made it clear to the retailers, both in its initial discussions and during the subsequent negotiations which resulted in their discontinuing the cut-price advertising, that its actions were part of an organized campaign directed against all price-cutting retailers in the area. Thus, a Parke Davis official testified that when Haft of Dart Drug complained that Peoples Drug was cutting prices on Parke Davis products, he told Haft that he "would see Peoples and try to get them in line" (R. 225). And, after Peoples had, in the words of the official, agreed to "go along with your plan" (R. 241), Drug Mart was induced to stop its advertising, in part, by being told that Peoples "was going to stop cutting prices, or had stopped * * *" (R. 147). Haft testified that when the Parke Davis sales representatives visited

him in July, 1956, they advised him that they had "already that day contacted Drug Mart" and that, after it had been advised it would be "cut off" if it did not cease its price-cutting activities, it had "indicated" it would stop (R. 60). They also stated that they would see a number of other price cutters "and anyone else that was applicable in this area" (R. 61). When the proprietor of State Drugs told the Parke Davis representative that it would be impossible for him to stop price cutting as long as others "were actually advertising it in the paper", the latter stated "that that had ceased" and State proposed to follow suit until it discovered that discounts were still in effect at its competitors (R. 117–118).

Similarly, the subsequent efforts of appellee to halt retail price cutting advertising involved far more than individual negotiations with particular retailers. For example, when the company endeavored in July 1956 to induce Haft of Dart to stop further price cutting advertising in return for being allowed to replenish his stocks of Parke Davis products, he was told that "all the rest of the stores were already in line, that is Drug Mart, Peoples, Babbitt and Standard; that I was the last one; that now that I was in line that he would give me his word that now that I stopped advertising, everyone else would stop advertising" (R. 64). As this turned out to be untrue, Haft recommenced his advertising and was once again cut off (R. 65–66, 224–225).

When in late August, Parke Davis made a new, more successful effort to "get some order out of chaos"

(R. 234), it was put forward frankly on the basis of a common understanding among the retailers. Thus, according to a Parke Davis official, State Drugs was informed that Parke Davis "had talked with Haft", who had indicated he would "take down his signs" though continuing to sell at cut rate, "and that there was a possibility we could straighten it out, would they want to go along on such a policy as that or such a plan?" (R. 233, see 119, 260–261). After the operator of State indicated that that would be satisfactory "if the other store would cease advertising in the paper" (R. 119–120, 233), the Parke Davis representatives returned a week later to "acknowledg[e] that everything was O.K." (R. 120). Similarly, Haft was told that "all the rest of the retailers [were] back in line * * *" (R. 74) and "everyone else would stop advertising" (R. 85).[18] And the proprietors of McReynolds Pharmacy were told that "Dart had said that it would not advertise" (R. 233–234). Accordingly, for a period of almost three months there was general adherence to the no-advertising plan, but when one retailer, Standard, subsequently did advertise, the entire common effort "bl[ew] up" (R. 263).

In inducing its wholesalers to boycott the price-cutting retailers, Parke Davis similarly made it clear that such "cooperation" was being sought and obtained from all of the wholesalers. The manager of the

[18] Dripps, the Parke Davis area manager, testified that, as a result of this discussion, Haft apparently gave his word "that he would not advertise cut prices" (R. 260). On September 25, 1956, Dripps wrote Haft: "Just a note to tell you it's a pleasure to do business with a man of his word" (R. 314).

Henry B. Gilpin Company, who had told the Parke Davis people he "didn't see how we could police this price cutting and that I [could] not give them any answer in any way whether we would go along with them or not at that time" (R. 126), testified that the Parke Davis representatives expressly stated "they were visiting all wholesalers in the same area on the same problem" (*ibid.*). The Vice-President of District Wholesale Drug stated that "I specifically asked them if we were the only wholesaler who would have that request made. And they said no, they were visiting all three local wholesalers. And I said 'Well, if that is the case, I will go along with whatever you suggest' " (R. 202, see also R. 198, 206, 207).

These facts, resting on undisputed testimony,[19] much of it provided or corroborated by Parke Davis offi-

[19] Appellee contends (Motion to Affirm, pp. 14, 15) that the "main prop" of the Government's case is Haft (of Dart Drug), and that the testimony of this witness is unreliable because it was inconsistent and was contradicted in several respects by other witnesses; and because Haft himself is interested in bringing a treble damage suit against Parke Davis. However, with a minor exception (see note 11, *supra*, p. 12), Haft's testimony, as cited herein, is fully corroborated by the other retailers and the Parke Davis representatives. Rather than being the "main prop" of the Government's case, he was but one of many important witnesses.

Appellee also attempts to minimize the damaging testimony given by the operators of State Drugs and McReynolds Pharmacy, on the ground that in the Government's answer to interrogatories, neither "was even alleged to be a co-conspirator" (Motion to Affirm, p. 16). In answering the defendant's interrogatories, the Government listed among the retail conspirators "The Drug Mart group" (R. 20), which includes State and McReynolds as members (Fdg. 24, R. 37). But even assuming that these two companies should have been specifically designated as co-conspirators and that interrogatories have the

cials, clearly require rejection of the lower court's finding that "every visit made by the [Parke Davis] representatives to the retailers and wholesalers was, to each of them, separate and apart from all others" (R. 29). Contrary to the finding, the record is undisputed that the visits were part of a single coordinated effect by Parke Davis to halt retail price cutting and cut-rate advertising of its products in the District of Columbia, and that both the retailers and the wholesalers were aware that their competitors were also being asked to participate in the elimination of price competition, and had undertaken to do so. These facts, without more, are strong evidence that Parke Davis had entered into an illegal price-fixing conspiracy with the retailers and wholesalers.

In *Interstate Circuit* v. *United States*, 306 U.S. 208, the trial court, in finding an illegal conspiracy in violation of the Sherman Act, had relied "on inferences drawn from the course of conduct of the alleged conspirators" (p. 221). In affirming the finding of conspiracy, this Court stated (pp. 226–227):

> * * * It was enough that, knowing that concerted action was contemplated and invited, the

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effect of limiting a party's proof (but see Moore, *Federal Practice* (2d ed.), Vol. 4, ¶ 33.29, pp. 2344–45; *McElroy* v. *United Airlines*, 21 F.R.D. 100, 102 (W.D. Mo.); *RCA Mfg. Co.* v. *Decca Records*, 1 F.R.D. 433, 435 (S.D.N.Y.)), evidence as to their participation in the plan was admitted without objection and therefore is part of the record (see Rule 15(b) of the Federal Rules of Civil Procedure: *Cathedral Estates* v. *Taft Realty Corp.*, 228 F. 2d 85, 87 (C.A. 2); *Underwriters Salvage Company of New York* v. *Davis & Shaw Furniture Company*, 198 F. 2d 450, 453 (C.A. 10); *Balabanoff* v. *Kellogg*, 118 F. 2d 597 (C.A. 9)).

> distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan.
>
> * * * Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. * * *

See, also, *United States* v. *Masonite Corp.*, 316 U.S. 265, 274–275; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 716, n. 17.

2. When some of the retailers refused to accede to Parke Davis' demand that they cease price cutting, Parke Davis not only refused to sell to them directly, but also "persuaded" all of the wholesalers in the District of Columbia not to sell to them. See the Statement, *supra*, pp. 9–12. The wholesalers were aware that failure to acquiesce in Parke-Davis' campaign would lead to their being cut off on Parke Davis' products (R. 130, 210, 271), and they were informed by Parke Davis that all of the wholesalers were being approached and had agreed to "cooperate" in the program (see *supra*, pp. 10, 27–28). As a result, the wholesalers refused to sell Parke Davis' product to the offending retailers, even going so far as to mark such products "out" on the retailers' orders, even though the items were in stock (see *supra*, pp. 11–12). That the wholesalers' refusal to sell to the retailers was the result of Parke Davis' pressure

rather than their independent business judgment is further shown by the fact that they did not resume selling to the retailers until Parke Davis had given them the green light, after it had reached an "understanding" with the retailers that the cut-rate advertising would cease.

Participation by the wholesalers in the Parke Davis' campaign against the price-cutting retailers, while obviously unnecessary if Parke Davis was merely exercising its right to sell to whom it chose, was essential for Parke Davis to achieve its aim of stopping price competition in the District. For, as long as the retailers had an alternative source of supply of Parke Davis' products through the wholesalers (although at somewhat higher prices, R. 59, 132, 141; see Fdg. 5, R. 31–32), the exercise by Parke Davis of its right under *Colgate* merely to refuse "to sell goods to persons who will not sell at stated prices" (*Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 454) would not be effective to force the retailers to stop cutting prices. The retailers could be brought to terms only by closing off all of their sources of supply.[20] Parke Davis ac-

[20] A Parke Davis witness testified that it had not been "necessary" to enlist the support of wholesalers in previous boycotts of offending retailers, since at that earlier period (before Parke Davis sold to wholesalers at prices cheaper than it sells directly to retailers) "it cost [retailers] more money through the wholesaler" and thus to "the people that were trying to buy from us at a better price, the wholesalers [higher] price did not amount to anything" (R. 244).

complished this by organizing and carrying out a boycott by the wholesalers.[21]

The conduct of this boycott by Parke Davis plainly went beyond "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch and Lomb Co.*, 321 U.S. 707, 721). It was, instead, "coercion of its customers" (*id.*, p. 722), intended to "get some order out of chaos" (R. 234) by inducing the retailers "to go along and play the game regularly * * * according to the rules" (R. 225). For Parke Davis hoped that after the retailers had "had enough" (R. 64), they would capitulate to its demands and undertake to adhere to Parke Davis' "suggested" resale prices in a non-"fair trade" area.

The record shows the same kind of "boycotts of price cutters" as a means of "suppress[ing] the freedom of competition by coercion of its customers" (*Bausch & Lomb*, p. 722) which were condemned in *Beech-Nut* as going "beyond the exercise of this right" "simply [to] refuse" to sell to price cutters, and thus being illegal because they "unduly hinder or obstruct the free and natural flow of commerce" (257 U.S. at 452, 453). Moreover, "this is not a case of a single trader refusing to deal with another" (*Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207, 212), but of a "group boycott" of the type which has "long been

[21] In marked contrast to the forced participation of the wholesalers in Parke Davis' efforts to control the retail price situation in the area as a whole, is Parke Davis' subsequent termination of all further direct dealings with the individual retailer, Haft (R. 307), which did not involve any effort to preclude the wholesalers from selling to him (R. 82).

held to be in the forbidden category [of *per se* violation]" (*ibid.*). Such a combination of manufacturer and wholesalers to boycott retailers refusing to maintain "suggested" resale prices has uniformly been held to violate the Sherman Act, regardless of whether the wholesalers were willing participants and beneficiaries of the scheme or merely joined with the manufacturer out of fear of being boycotted themselves. See *Federal Trade Commission* v. *Beech-Nut Packing Co.*, *supra*, at 448;[22] *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436; *United States* v. *Univis Lens Co.*, 316 U.S. 241; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707; *United States* v. *Frankfort Distilleries*, 324 U.S. 293 (combination of retailer and wholesalers to force price-fixing agreement on manufacturer); *Armand Co.* v. *Federal Trade Com-*

[22] In *Bausch & Lomb*, *supra*, at 722, this Court, discussing the factors present in *Beech-Nut* which went beyond a simple refusal to sell to price cutters, referred to two other types of actions in addition to "boycotts of price cutters". These were (1) the use of "special agents of the company" to police the price maintenance scheme; and (2) the use of "reports of competitors about customers who violated resale prices". Both of these elements are also present here. Agents of Parke Davis, including supervisory personnel not normally in direct contact with retailers, were dispatched on special missions to warn the offending retailers that Parke Davis would cut them off if they did not cease price cutting (or later cease price cut advertising). (See the Statement, *supra*, pp. 7-9, 12-14.) These agents also policed the subsequent boycott, reporting with disapproval incidents they had discovered of "leakage" of Parke Davis products from wholesalers to a boycotted retailer (R. 126). Moreover, while the Parke Davis salesmen were the principal source of information to the company about retail price cutters, other retailers also supplied names (R. 225, 239).

mission, 78 F. 2d 707 (C.A. 2); *Cream of Wheat Co.* v. *Federal Trade Commission*, 14 F. 2d 40 (C.A. 8); *Moir* v. *Federal Trade Commission*, 12 F. 2d 22 (C.A. 1); *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, 818 (C.A. 3); *John D. Park & Sons Co.* v. *Hartman*, 153 Fed. 24 (C.A. 6).

3. Appellee emphasizes (Motion to Affirm, pp. 8–9, 13–14, 19–20) that the retailers and wholesalers testified that they had not entered into any price-fixing "agreement" with Parke Davis (R. 139, 167, 241, 271–272);[23] and that Parke Davis officials testified that they had no authority to, and did not, enter into such "agreements" with their customers. But the crucial question is what these individuals did, not how they subsequently described it in their testimony.[24] As we have shown, the uncontradicted evidence establishes that, in actual fact, Parke Davis did enter into price-fixing agreements with its re-

[23] Other retailers, however, did use the word "agreement" and "agree" in describing their dealings with Parke Davis (R. 64–65, 110, 112, 119, 198, 203).

[24] The artificiality of appellee's position is shown by a memorandum by J. A. Bradshaw, Parke Davis' assistant general attorney (R. 169), dealing with the company's right to refuse to sell to stores which fail "to maintain Fair Trade Prices" (R. 312). Bradshaw reached the following conclusion (*ibid*):

"The distinction is that we can lawfully say 'we will sell you only so long as you observe such minimum retail prices' but cannot say 'we will sell you only if you agree to observe such minimum retail prices,' since except as permitted by Fair Trade legislations agreements as to resale price maintenance are invalid."

In other words, Parke Davis would make the test of illegality of a price-fixing agreement whether the parties use the word "agree."

tailers and wholesalers. Of course, an illegal agreement "between the seller and purchaser to maintain resale prices" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721) need not be express; it may be "implied from a course of dealing or other circumstances" (*United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 99; *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210).

The short of the matter is that Parke Davis' entire "course of dealing" (*Schrader* case, *supra*) in seeking to eliminate retail price-cutting in the District of Columbia went far beyond the exercise of a manufacturer's right "to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell * * *" (*Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 451). For the uncontradicted evidence in this record shows a concerted effort by Parke Davis, in conjunction with its retailers and wholesalers, to fix the retail prices of its products and, when that proved unsatisfactory, to minimize the price competition by eliminating cut-price advertising. In so doing, it extracted agreements and understandings from reluctant retailers as a result of threatened or actual boycotts, in which it forced its wholesalers to join. In the light of these facts, we submit that there is no basis in the record for the district court's conclusion that Parke Davis did not enter into any agreements with the retailers or ~~manufacturers~~. On the contrary, the record here clearly shows a price-fixing

conspiracy and combination in violation of the Sherman Act.

B. THE WHOLESALE PRICE MAINTENANCE SCHEME[25]

The district court further erred, we believe, in holding that Parke Davis' continuing actions to maintain its "suggested" wholesale resale prices in the District of Columbia amounted to no more than a seller's unilateral selection of customers which is permissible under the *Colgate* doctrine. Here, too, as in the case of the retail price maintenance plan, the basic facts are undisputed; the question is what inferences are to be drawn from such facts.

Parke Davis distributes its products in the District directly to retailers, and indirectly through independent wholesale drug dealers.[26] Parke Davis and the wholesalers sell directly to many of the same retailers and are in direct competition for their business

[25] Appellee contends (Motion to Affirm, p. 3, n. 1) that since the statement of questions in the Government's notice of appeal and jurisdictional statement do not refer to the maintenance of wholesale prices, this question is "not before this Court." In its Jurisdictional Statement, however, the Government specifically reserved the right to argue the point (Juris. St., note 16, p. 17).

[26] The wholesalers uniformly testified that Parke Davis was in competition with them (R. 134, 142, 162–163, 188, 189, 196), one stating Parke Davis was its "biggest competitor" in the sale of its products to retailers (R. 192–193). A Parke Davis witness conceded that it sells "to the same retail customers [as its] wholesaler-distributor" and that "[t]o some extent" it "competes price-wise with [its] wholesalers" (R. 252–253; see also R. 224). In the Washington area in 1956, Parke Davis sold $199,304 worth of products directly to retailers and $161,247 to wholesalers (Fdg. 2, R. 31).

(R. 132, 134–135, 142, 162–163, 188, 189, 192–193, 199, 224, 252–253).[27]

Parke Davis has the "continuing policy" that it will sell only to wholesalers who will observe the "Net Price selling schedule" in its wholesale price list (R. 310B; see R. 249). The wholesalers who handle Parke Davis' products uniformly followed these "suggested" resale wholesale prices (R. 130–131, 136, 188, 196). Furthermore, the wholesalers are not "permitted" (R. 196, 224) to make available to their customers the substantial quantity discounts which Parke Davis offers to retailers dealing directly with it (R. 95–96, 142, 163, 189, 196). The result is that although, as Parke Davis officials admitted, the independent wholesalers "can offer much better service" (R. 224)[28] and "render a variety of services that Parke Davis does not render" (R. 271), the wholesalers sell far smaller percentages of Parke Davis products to the retail druggists than of most other drug lines which they carry (R. 142–143).

The record is clear that the wholesalers follow Parke Davis' "suggested" resale prices, not because they adopted such prices in the exercise of their own

[27] Prior to 1947, Parke Davis sold to wholesalers at the same price it sold to retailers (R. 235–236). However, it changed this to provide wholesale discounts so that retailers purchasing "in small quantities" or at times not convenient for Parke Davis could secure Parke Davis products from the wholesalers (who, unlike Parke Davis, render these special services, R. 271) and still make the standard markup on such products (R. 236).

[28] The Parke Davis official testified that the wholesaler "can sell a dozen or a twelfth of a dozen" and "is in [the retailer's] store once or twice a week, he calls them every day on the phone, and we cannot service customers that well" (R. 224).

business judgment, but because Parke Davis requires them to do so and they know that, if they fail to conform, Parke Davis will cut them off (R. 162, 189, 190, 249, 271–272). Since Parke Davis products are widely distributed and in demand, an individual wholesaler who is cut off obviously would be under a serious competitive disadvantage vis-à-vis the other wholesalers in the area who continue to obtain these important items.

In the circumstances, we do not believe that Parke Davis can justify its maintenance of wholesale prices as involving no more than a seller's right to refuse "to sell to customers who will not resell at prices fixed by the seller" (*United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 721). For "[a] distributor of a trade-marked article may not lawfully limit by agreement, *express or implied,* the price at which * * * its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings [and McGuire] Act[s]" (*ibid.*, emphasis added). In the instant case, Parke Davis has "limit[ed] by [implied] agreement * * * the price at which * * * its [wholesale] purchaser may resell" its products in a non-"fair trade" area.

The record shows that Parke Davis was not merely selecting the particular customers with which it will deal. There is nothing in this record which shows any selection of wholesale customers by Parke Davis in the Washington area. On the contrary, Parke Davis requires all of its wholesale customers, even those in non-"fair trade" areas, upon pain of being cut off, to adhere to the resale prices which it pre-

scribes. Moreover, this requirement obviously is designed to insure that the wholesalers will not compete with it pricewise. For although Parke Davis concedes that the wholesalers can render better service to many of the retailers than it can, it refuses to permit the wholesalers to allow the retailers the quantity discounts which Parke Davis alone may give.

Parke Davis' action in policing the allowance of a cash discount by one of its wholesalers refutes its contention that it did no more here than engage in "permissible selection of customers under the decision in *Colgate & Co.* * * *". *Bausch & Lomb* case, *supra*, p. 729. One of the wholesalers had a policy of giving retailers an annual deferred discount. Parke Davis first advised him that he would have to eliminate this discount, but could give his customers a 2% cash discount. However, Parke Davis subsequently advised him that this cash discount would also have to be eliminated because, although most customers had prepaid their purchases with the wholesaler through cash deposits, the wholesaler "did not in each instance, before [it] took off the cash discount from [its] invoice, examine the state of the account of the particular customer * * * [to see] if there was, in fact, cash available" (R. 191, see R. 186–192, 268–271).[39] The Parke Davis area manager, who had

[39] While there is some indication that the district court may have granted a motion to strike the testimony of the wholesaler dealing with this incident (R. 186–193), it appears that it probably did not. See R. 193, 266–267. In any event, the court subsequently permitted a Parke Davis official to give substantially the same evidence (R. 267–271). While the evi

required the wholesaler to stop the cash discount, testified that he had told the wholesaler that this method of giving the discount was objectionable because it "gave the Washington Wholesale Drug Exchange a competitive advantage over Parke Davis" (R. 269; R. 270). It is difficult to understand what possible interest Parke Davis could have in whether, at the time the cash discount was given, the particular retailer had sufficient cash on deposit to cover the order, except for the fact that Parke Davis was in competition with the wholesaler and the giving of such discount would give the latter "a competitive advantage" over it.

Since Parke Davis and its wholesalers directly compete with each other in the sale of Parke Davis products to the retailers, express resale price maintenance agreements between Parke Davis and the wholesalers would be illegal. *United States* v. *McKesson and Robbins,* 351 U.S. 305. Price fixing, however, is equally illegal whether it "is accomplished by express contract or by some more subtle means * * *" (*id.*, p. 310). Where, as here, a manufacturer is in direct competition with its wholesalers in selling to retailers, we submit that understandings and implied agreements between it and the wholesalers under which the latter, on pain of being cut off, undertake to follow the manufacturer's "suggested" resale prices, constitute an illegal price-

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dence related to events prior to the date specified in the complaint as the beginning of the conspiracy (July 1956, R. 4), it was admissible as showing the background of the conspiracy. Cf. *United States* v. *Valenti*, 134 F. 2d 362, 365 (C.A. 2); *United States* v. *General Motors Corporation*, 121 F. 2d 376, 407-408 (C.A. 7), certiorari denied, 314 U.S. 618.

fixing agreement which violates Section 1 of the Sherman Act.[29a] For the effect of Parke Davis' wholesale price maintenance plan is that "competition among * * * [wholesale] distributors is practically suppressed; for all who would deal in the company's products are constrained to sell at the suggested prices." *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455. In terms of its actual effect upon competition, the result is no different than if Parke Davis had entered into express "fair trade" agreements with its wholesalers. Such agreements, however, would be illegal in the non-"fair trade" areas here involved. The decision below, therefore, permits Parke Davis to do indirectly, through its control over the source of supply, what it could not do directly.

II

THE COURT BELOW ERRED IN HOLDING, AS AN ALTERNATIVE GROUND FOR DISMISSING THE COMPLAINT, THAT THE GOVERNMENT WAS NOT ENTITLED TO INJUNCTIVE RELIEF BECAUSE THERE WAS "NO REASONABLE PROBABILITY" THAT PARKE DAVIS WOULD RESUME ITS ATTEMPTS TO FIX RESALE PRICES

The court below also erred, we believe, in holding, as an alternative ground for dismissing the complaint,

[29a] The recent decision of the Court of Appeals for the Fourth Circuit in *McElhenny Co.* v. *Western Auto Supply Co.* (No. 7813, decided July 16, 1959) is not to the contrary. There the court upheld the district court's dismissal of a private antitrust complaint charging that a manufacturer's threats to stop selling to retail outlets who handled products of competing manufacturers, and its ultimate carrying out of such threats, violated, *inter alia*, Section 3 of the Clayton Act. The court pointed out that Section 3 does not "prohibit a unilateral refusal to sell," but only agreements not to handle a competitor's products (Slip op., p. 7); and it recognized that "the course of dealing between seller and buyer

that the Government was not entitled to injunctive relief because there was "no reasonable probability" that Parke Davis would resume its attempts to fix resale prices (R. 30). While a court of equity has "broad" discretion to determine whether "relief is needed," there must be a "reasonable basis for the District Judge's decision" that relief is unnecessary. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633, 634. We submit that there is "no reasonable basis" (*Grant, supra*, p. 634) for the district court's conclusion that there is "no reasonable probability" that Parke Davis may resume its unlawful price-fixing activities.[30]

1. The district court gave three reasons for its ruling. (1) "[I]n the fall of 1956, [Parke Davis] abandoned in good faith its efforts to maintain mini-

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may * * * go beyond mere customer selection and the independent announcement of policy and ripen into an implied or informal agreement or understanding" (p. 6). But it ruled (p. 9) that the complaint was insufficient to charge a violation of Section 3 because it lacked a "clear cut allegation" that there was any "agreement or understanding" between the manufacturer and retailers that the latter would not handle competing products. However, the court remanded the case to the district court to permit the plaintiffs to amend their complaint to allege that the exclusive dealing was the result of a "condition, agreement or understanding."

The decision, therefore, holds only that the plaintiffs failed properly to charge a violation of Section 3 of the Clayton Act because of the absence of any "clear cut allegation" that the exclusive dealing rested on agreements, expressed or implied. In the instant case, however, the record establishes that there were implied price-fixing agreements between Parke Davis and its resale and wholesale outlets.

[30] Obviously, the case is not "moot" in the sense that cessation of the challenged practices "deprive[s] the tribunal of power to hear and determine the case * * *." *Grant* case *supra*, p. 632.

mum resale prices in the involved territory"; (2) "the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field"; and (3) "under the long-continuing competitive conditions, neither defendant nor other manufacturer or distributor of like goods could possibly attempt to do so" other than with "heavy financial loss" (R. 30). None of these reasons has any support in the record.

The only evidence showing the reasons for abandonment of Parke Davis' attempts to enforce retail "fair trade" prices in the District of Columbia and Virginia[31] is the testimony of Parke Davis' assistant general attorney that "one of the reasons" therefor was the Government's antitrust investigation (R. 174–175). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of * * * reform, especially when abandonment seems timed to anticipate suit * * *." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333; see,

[31] The record shows that Parke Davis' 1956 endeavors to enforce retail price maintenance in the Washington area were in implementation of a national policy of the company to enforce "fair trade" prices on its products even in non-"fair trade" areas (R. 251–252, 274–275, 277–279, 315; cf. R. 31, 40–41, 236). While there was testimony that this national policy had been abandoned (R. 174), there is no evidence with respect to any economic conditions that may have led to its abandonment. Of course, the mere abandonment of illegal practices is not itself a sufficient ground for denying injunctive relief.

The relief requested in the Government's complaint was not limited to the Washington area (R. 7–8). Upon a finding of violation, a court may, and sometimes must, grant relief which goes beyond the particular violation shown. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 435, 436; *United States* v. *United States Gypsum Co.*, 340 U.S.

also, *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, 310 (C.A. 7); cf. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 42–43.

The only evidence relating to "business and economic conditions in its field" is the testimony that since the year 1955 Parke Davis' "sales volume has gone up generally" (R. 275). The statement by a Parke Davis official that the price situation in the District had "blown up again" in November 1956 when cut price advertising was resumed (R. 263, 314), and the fact that thereafter the retailers were able to obtain Parke Davis products despite their cut-rate advertising and selling (R. 81–82, 110, 122, 160), certainly does not establish the "economic conditions" conjectured by the court. Obviously, a defendant who admittedly abandoned its practices because of the Government's antitrust proceedings would not resume them during the pendency thereof.

Finally, there is no evidence of any nature concerning the "long continuing competitive conditions" or supporting the assertion that neither Parke Davis nor any other drug manufacturer or distributor could attempt a new boycott of price cutters except at a "heavy financial loss." There is not even any evidence that Parke Davis sustained any financial loss as a result of its 1956 efforts.

2. There is nothing in the record which indicates

76, 90. In the circumstances, we believe that, before the district court properly could conclude that no relief at all was necessary, it was required to consider whether, even assuming *arguendo* that no relief was necessary in the Washington area, relief might not still be required with respect to carrying out the company's national policy.

that Parke Davis has ever abandoned its conspiracy with the wholesalers under which the latter "adhere to resale prices fixed by" it (R. 5). See *supra*, pp. 36–41. Since this agreement was specifically alleged in the complaint to be one of the terms of the conspiracy, the district court plainly erred in holding that there was no need for relief with respect to it.

3. Unlike the interlocking directorates in *Grant*, any resumption of which could be easily detected, the price-fixing schemes here involved subtle and implied agreements and understandings which are necessarily difficult to uncover. In this situation, we submit that the Government establishes a prima facie case for relief upon showing that the defendant has committed the violations charged, and that the defendant then has the burden of coming forward to show that special circumstances exist which make relief unnecessary in the particular case. "A trial court upon a finding of conspiracy in restraint of trade * * * has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88; see, also, *International Salt Co.* v. *United States*, 332 U.S. 392, 400–401.

Since it was Parke Davis which raised the issue that there was no need for relief (as one ground for its motion to dismiss at the close of the Government's case, R. 279, 281), it was incumbent upon it to show that there is "no reasonable expectation that the wrong will be repeated" (*United States* v. *Alumi-*

num Company of America, 148 F. 2d 416, 448 (C.A. 2)).[32] In the case of interlocking directorates, termination of the interlocks, accompanied by a disclaimer of "any intention to revive" them (*Grant* case, *supra*, p. 633), may then shift the burden to the Government to "satisfy the court that relief is needed" (*ibid.*). Here, however, where the problems of detecting resumption are far more difficult, Parke Davis did not even disclaim any intention to resume its price-fixing attempts, much less attempt to show that, because of economic or other conditions, relief is unnecessary. On the contrary, it relied solely on the fact of abandonment—an abandonment which, concededly, took place only after the Government had instituted its investigation into the legality of the practices and partly as a result thereof. Contrary to the district court's conclusion (Fdg. 27, R. 38), that fact is not enough to shift the burden to the Government to submit "proof" of Parke Davis' "intention * * * to resume such [price fixing] efforts." Indeed, in a case

[32] In that case, the defendant was found to have maintained, prior to 1933, such a narrow margin between its price for ingot and its price for rolled sheets as to effect a price "squeeze" upon competitors engaged in making rolled sheets from ingot purchased from the defendant. 148 F. 2d at pp. 437–438. By its decision rendered in 1945, the Court of Appeals directed the district court to enjoin such a price squeeze, discontinued twelve years earlier. *Id.*, at p. 447. The court said (*ibid.*):

"* * * It is enough here to say that, since 'Alcoa' abandoned the 'squeeze' only after it became aware that it was under investigation, it is in no position now to complain of whatever stigma there may be in an injunction; in such a setting there is no place for sensibilities: nor should lapse of time secure immunity * * *."

of this kind the evidence of unlikelihood or impossibility of resumption is peculiarly within the knowledge of the defendant, and it is the defendant which must come forward with such evidence.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 1959.

U. S. GOVERNMENT PRINTING OFFICE 1959